Supreme Court, U.S.
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No. 08-571

In The
Supreme Court of the United States

ELKO COUNTY, NEVADA,

Petitioner,

v.

THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS; UNITED STATES OF AMERICA; AND JOHN C. CARPENTER, INDIVIDUALLY AND AS AGENT FOR CITIZENS UNITED FOR THE SOUTH CANYON ROAD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.2(b), Mountain States Legal Foundation ("MSLF") respectfully requests leave of this Court to file the accompanying amicus curiae brief, in support of Petitioner. Petitioner, Respondent, United States of America, and Respondent, John C. Carpenter, granted consent to MSLF to file an amicus curiae brief. Respondents, The Wilderness Society and Great Old Broads for Wilderness, however, withheld consent.

As demonstrated in the Identity and Interest section of the accompanying amicus curiae brief, MSLF may be adversely affected by the Ninth Circuit's decision in the instant case and believes that its amicus curiae brief will bring relevant matters to this Court's attention. As a result, MSLF respectfully requests that its Motion for Leave to File Amicus Curiae Brief be granted.

DATED this 1st day of December 2008.

Respectfully submitted by:

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QUESTION PRESENTED

The Quiet Title Act ("QTA"), 28 U.S.C. § 2409(a), operates as a limited waiver of the United States' sovereign immunity so that parties may resolve disputes regarding title to interests in real property against the United States. *Block v. North Dakota*, 461 U.S. 273, 280-87 (1983). The question presented is:

Do environmental groups, which assert no ownership interest in the disputed real property, have "an interest relating to the property . . . that is the subject of the action" so as to entitle them to intervene as of right in a QTA case?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

MSLF is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has over 5,000 members throughout the United States. The majority of these members own property, and/or do business in the western United States. A significant portion of these members are direct descendants of, or successors-in-interest to, the

[1] Pursuant to Supreme Court Rule 37, letters advising of MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date hereof. Pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored the accompanying amicus curiae brief in whole or in part and that no party, person, or entity, other than MSLF, its members, and its counsel, made a monetary contribution for the preparation or submission of this brief.

original settlers, miners, railroads, farmers, and/or irrigators who acquired real property interests under the numerous land grant and/or right-of-way statutes that were passed in the late 1800s and early 1900s. *See, e.g.*, the Homestead Act of 1862, 12 Stat. 392-93 (43 U.S.C. § 161 *et seq.*) (repealed 1976); Section 9 of the Mining Act of 1866, 14 Stat. 251, 253 (43 U.S.C. § 661) (repealed 1976) (granting the right-of-way for ditches and canals); the General Mining Law of 1872, 30 U.S.C. § 21 *et seq.*; the General Railroad Right of Way Act of 1875, 18 Stat. 482-83 (43 U.S.C. §§ 934-939) (repealed 1976); the General Right of Way Act of 1891, 26 Stat. 1101-02. (43 U.S.C. §§ 946-949) (repealed 1976); the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (43 U.S.C. §§ 291-302) (repealed 1976).[2]

Because of these land grant and right-of-way statutes and the federal government's change in philosophy from land disposal to land retention, *see Lujan v. National Wildlife Federation*, 497 U.S. 871, 875-77 (1990), private and federal real property interests have become intermingled throughout the western United States. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (describing checkerboard land pattern created by the Union Pacific Act

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[2] Although the Sections 702 and 706(a) of Federal Land Policy and Management Act of 1976 ("FLPMA"), 90 Stat. 2787-89, 2793-94, repealed most of these land grant and right-of-way statutes, Section 701 of FLPMA expressly preserved all "valid existing rights" and rights-of-way. 90 Stat. 2786.

of 1862); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) (describing private surface and federal mineral estates created by the Stock-Raising Homestead Act); *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999) (holding that Congress did not reserve coalbed methane when it reserved the coal in lands patented under Coal Lands Acts of 1909 and 1910). Because of these intermingled real property interests, MSLF has represented clients in Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, cases against the United States. For example, MSLF has represented inholders seeking to quiet title to an easement across federal lands in order to access their lands patented under the various homestead acts. *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994), *on appeal after remand*, 129 F.3d 1348 (10th Cir. 1997); *Fitzgerald Living Trust v. United States*, 460 F.3d 1259 (9th Cir. 2006); *McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005), *on appeal after remand, McFarland v. Kempthorne*, ___ F.3d ___ (9th Cir. 2008), 2008 WL 4426628.

MSLF has also represented clients in QTA cases seeking to quiet title to rights-of-way under Section 8 of the Mining Act of 1866, 14 Stat. 251, 253 (43 U.S.C. § 932) (repealed 1976). *Millard County, Utah v. United States*, No. 93-C-591J (D. Utah); *United States v. Boundary County, Idaho*, No. 98-0253-N-EJL (D. Idaho). This statute, which is at issue in the instant case and is commonly referred to as "R.S. 2477," provided: "[t]he right of way for the construction of highways over public lands, not reserved for

public uses, is hereby granted." 14 Stat. at 253. This statutory grant played an important role in the development of the western United States. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 740 (10th Cir. 2005) (noting that "most of the transportation routes of the West were established under [R.S. 2477]"). Moreover, because the grant in R.S. 2477 could be accepted without any action on part of the federal government, there has been significant controversy over the last thirty years regarding the existence of such rights-of-ways. *See* Note, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. Ann. Surv. Am. L. 547, 556-60 (2008). As a result, more QTA litigation involving R.S. 2477 rights-of-way will occur in the years to come. *See* U.S. Department of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Claims on Federal and Other Lands* 29 (1993) (noting that there were approximately 5,600 R.S. 2477 claims pending with the Bureau of Land Management).

In the instant case, the Ninth Circuit ruled that environmental groups, which asserted no ownership interest in the disputed real property, were entitled to intervene as of right in a QTA case. If the Ninth Circuit's decision is allowed to stand, it will seriously impact MSLF, its members, and future clients, as well as the United States. In fact, nothing could be better calculated to frustrate QTA litigation than the rule adopted by Ninth Circuit. Indeed, allowing environmental groups, which assert no ownership

interest, into QTA litigation will drastically increase litigation expenses and delay the resolution of what is a private dispute. In short, the Ninth Circuit's decision will turn QTA cases into public forums for debating federal land management policies.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT FEDERAL QUESTION REGARDING WHO IS ENTITLED TO INTERVENE AS OF RIGHT IN A QTA CASE.

A. An Applicant For Intervention Of Right Must Demonstrate A "Legally Protected Interest."

Rule 24(a) of the Federal Rules of Civil Procedure provides, in relevant part:

> **Intervention of Right**. On a timely motion, the court must permit anyone to intervene who:
>
> * * *
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Thus, under Rule 24(a)(2), an applicant is entitled to intervene as of right when four requirements are satisfied: (1) a motion to intervene is timely filed; (2) the applicant claims an "interest relating to the property or transaction that is the subject of the action;" (3) the applicant "is so situated that disposing of the action may as a practical matter impair or impede the [applicant's] ability to protect its interest;" and (4) that "interest" is not "adequately represent[ed]" by existing parties. Since the 1966 Amendments to Federal Rules of Civil Procedure, Rule 24(a)(2) has remained substantially unchanged. 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 1908.1 (2008) ("Wright & Miller"). During this time, this Court has, on two occasions, specifically addressed the second requirement for intervention as of right.

In the first case, *Cascade Natural Gas Corp. v. El Paso Natural Gas Company*, 386 U.S. 129, 131-36 (1971), this Court allowed three applicants to intervene in a government antitrust case. The case was complicated because the motions to intervene were not filed until after it became apparent that this Court's earlier mandate was not being followed. *Id.* at 935-36; *see United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964) (ordering El Paso to divest of Pacific Northwest Pipeline Corporation). To further complicate matters, by the time the case had reached

this Court, Rule 24 had been amended in 1966.[3] *Cascade*, 386 U.S. at 935. Over a strong dissent, the majority of this Court granted intervention to two of the applicants under the old Rule 24 and granted intervention to the third under the new Rule 24.[4] *Id.* at 935-37. Because of these complicating factors, the lower courts, commentators, and legal scholars have not regarded the majority's decision in *Cascade* as significant precedent regarding the requisite "interest" for intervention as of right under Rule 24(a)(2). *United States v. Automobile Manufacturers Ass'n*, 307 F.Supp. 617, 619 n.3 (C.D. Cal. 1969), *appeal dismissed, New York v. United States*, 397 U.S. 248 (1970) (suggesting that the ruling in *Cascade* is "*sui generis* and must be limited to the facts of that case"); Wright & Miller, *supra*, § 1908.1 ("[T]he Court's

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[3] Former Rule 24 had been interpreted as requiring applicants to show that they would be "bound" in a *res judicata* sense by the resulting judgment in the pending case to be entitled to intervene as of right. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689-93 (1961). The 1966 amendments to Rule 24 were intended to, *inter alia*, alleviate the harshness of that ruling. Fed. R. Civ. P. 24, 1966 Advisory Committee Note.

[4] In dissent, Justice Stewart, joined by Justice Harlan criticized the majority opinion because it "repudiate[d] a large and long-established body of decisions specifically, and correctly, denying intervention in government antitrust litigation." *Id.* at 147 (Stewart, J., dissenting). Instead, Justice Stewart would have ruled that none of the applicants were entitled to intervene under either the old or new Rule 24 because they lacked a "sufficiently direct and immediate" interest to intervene in federal antitrust litigation. *Id.* at 153-54 (Stewart, J., dissenting).

desire to see that its mandate be obeyed provided strong pressure for a liberal reading of the intervention requirements."); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721, 729-30, 741-42 (1968) (same).

The second case is *Donaldson v. United States*, 400 U.S. 517 (1971). In that case, the IRS, which was investigating a taxpayer's federal tax returns, served summonses on a former employer of the taxpayer and an accountant for the employer, demanding that they produce certain records regarding the taxpayer. *Id.* at 518-19. The taxpayer first obtained a federal court injunction restraining the employer and the accountant from complying with the summonses without a court order. *Id.* at 519-20. The United States then filed petitions with the same court to enforce compliance with the summonses. *Id.* at 520. The taxpayer then moved to intervene in those enforcement proceedings. *Id.* at 521. After the district court's denial of the taxpayer's motion was upheld on appeal, *id.* at 521-22, this Court granted certiorari because of the confusion regarding the right to intervene in such enforcement proceedings. *Id.* at 522.

After determining that the Federal Rules of Civil Procedure were applicable to such enforcement proceedings, *id.* at 528-29, this Court rejected that taxpayer's argument that he was entitled to intervene as of right. *Id.* at 530-31. Specifically, this Court ruled that the records were the employer's routine business records, in which the taxpayer had "no

proprietary interest of any kind" or any claim of work-product or privilege. *Id.* at 530. Instead, because the employer and the accountant were willing to produce the records, this Court ruled that the taxpayer's asserted interest was nothing more than a "desire" to overcome that willingness. *Id.* at 531. This Court then ruled that this "desire:"

> [C]annot be the kind [of interest] contemplated by Rule 24(a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a *significantly protectable interest.*

Id. at 531 (emphasis added).

It was probably no accident that the term "significantly protectable interest" in *Donaldson* is very similar to the "legally protectable interest" term that this Court has employed in its standing analysis. *See Gange Lumber Co. v. Rowley*, 326 U.S. 295, 307-08 (1945) ("In our view appellant has not made the showing of substantial harm, actual or impending, to any *legally protected interest* which is necessary to call in question the statute's validity.") (emphasis added). It follows then that "significantly protectable interest" means more than just a general or abstract interest in the ongoing litigation. *See Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring) (abstract or speculative interests do not satisfy *Donaldson*'s "significantly protectable interest" requirement). Instead, "significantly protectable interest" must mean the "legally protected interest," which

the "actual and imminent invasion of" will satisfy the "injury" requirement for Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted). Such a conclusion is in accordance with this Court's admonition that federal courts are not forums for airing generalized grievances. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (noting that this Court has refrained from adjudicating "abstract questions of wide public significance" that amount to generalized grievances shared by a large number of citizens).

B. An Applicant's "Legally Protected Interest" Must "Relate To" The Claim For Relief At Issue.

It is well established that the Federal Rules of Civil Procedure are construed in accordance with their "plain meaning." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). Rule 24(a)(2) requires that an applicant for intervention of right "claim[ ] an interest *relating to* the property or transaction that is the subject of the action[.]" Fed. R. Civ. P. 24(a)(2) (emphasis added). The plain meaning of "relate" is "to show or establish logical or causal connection between." *Merriam-Webster's Collegiate Dictionary* 1051 (11th ed. 2003). Thus, based upon the plain language of Rule 24(a)(2), there must be a "logical or causal connection between" the applicant's "legally protected interest" and the claim for relief at issue. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995) ("In ascertaining a potential

intervenor's interest in a case, our cases focus on the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues."); *Sierra Club v. EPA,* 995 F.2d 1478, 1484 (9th Cir. 1993) (there must be "a relationship between the legally protected interest and the claims at issue"). As a result, the particular claim for relief at issue must be considered when reviewing an application for intervention of right. *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2nd Cir. 1984) ("The requirements for intervention embodied in Rule 24(a)(2) must be read . . . in the context of the particular statutory scheme that is the basis for the litigation. . . .").

C. Only Those Who Assert An Ownership Interest In The Disputed Real Property Have A "Legally Protected Interest" "Relating To The Property" In A QTA Case.

The sole purpose of a QTA case is "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). In fact, the QTA is the exclusive means by which to challenge the United States' title to real property. *North Dakota,* 461 U.S. at 286. Thus, a person seeking to quiet title to real property against the United States must set forth, with particularity, the nature of the claimed interest in the real property, the circumstances under which it was acquired, and the right title and interest of the United States. 28 U.S.C.

§ 2409a(d). In short, a QTA case is "an *in personam* proceeding . . . the purpose of *which is to determine which named party has superior claim* to a certain piece of property." *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993) (citing *Nevada v. United States*, 463 U.S. 110, 143-44 (1983)) (second emphasis added). Moreover, if the final judgment is adverse to the United States, it may elect to keep all or part of the prevailing party's real property upon the payment of "just compensation."[5] 28 U.S.C. § 2409a(b).

Because of the limited nature of a QTA case, third parties who assert no ownership interest have no right to intervene in such a case. *Cf. Alaska v. United States*, 534 U.S. 1103 (2002) (approving Report of Special Master denying intervention in an original QTA case by individuals who lacked interest in disputed real property); *Arizona v. California*, 530 U.S. 392, 419 n.6 (2000) (refusing to consider objections by an association that was denied intervention because its members lacked any interest in the land or water at issue); *Utah v. United States*, 394 U.S. 89, 92-93 (1969) (in an original action, this Court recognized that a purported property owner would have

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[5] Conversely, "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by [28 U.S.C. § 1346(f)]." 28 U.S.C. § 2409a(e).

been entitled to intervene in a title dispute but for the fact the original parties had resolved their differences regarding his property); *Smith v. Gale*, 144 U.S. 509, 518 (1892) (to intervene in a private quiet title suit an applicant must claim an interest in, or lien on, the property at issue) (citing *Horn v. Volcano Water Co.*, 13 Cal. 62, 70 (1859) (Stephen J. Field, J.)). This conclusion is in accordance with the well established rule that only persons who claim an ownership interest in the disputed real property may bring or defend a QTA case. *Long v. Area Manager*, 236 F.3d 910, 915 (8th Cir. 2001) (No one can assert a QTA claim who "does not claim a property interest to which title may be quieted."); *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978) (members of the public do not have the requisite "interest" in a purported public road to bring a QTA case against the United States).

This conclusion is further supported by the principle that a third party may not conduct QTA litigation on behalf of the United States. Indeed, Congress has delegated that authority exclusively to the U.S. Department of Justice under the direction of the Attorney General. 28 U.S.C. § 516; *see Utah*, *supra*, 394 U.S. at 94-5 (Solicitor General has "broad authority" to conduct litigation involving ownership of property on behalf of the United States before this Court); *Carlson v. United States*, 556 F.2d 489, 493 (Ct. Cl. 1977) (a third party has "no authority to claim land on behalf of the United States"); *Leisnoi, Inc. v. United States*, 313 F.3d 1181, 1185 (9th Cir. 2002) (the

decision to disclaim all interest in the property at issue in the QTA is "entirely the prerogative of the United States"); *cf. St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 640-41 (1881) (it "does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it").

Finally, this conclusion is also supported by Rule 19 of the Federal Rules of Civil Procedure. This Rule addresses the required joinder of an absent person who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may" "as a practical matter impair or impede the person's ability to protect the interest[.]" Fed. R. Civ. P. 19(a)(1)(B)(i). The similarity of this language and that found in Rule 24(a)(2) is no mistake. Indeed, one purpose of the 1966 amendments to the Federal Rules of Civil Procedure was to "tie more closely together the related situations" of joinder and intervention. *Atlantis Development Corp. v. United States*, 379 F.2d 818, 823-24 (5th Cir. 1967). Thus, under the 1966 amendments, a person whose "position is comparable to that of a person under Rule [19]" is entitled to intervene as of right, "unless that [person's] interest is already adequately represented in the action by existing parties." Fed. R. Civ. P. 24, 1966 Advisory Committee Note; *Atlantis Development Corp.*, 379 F.2d at 825 ("the question of whether an intervention as a matter of right exists often turns on the unstated question of whether joinder of the intervenor was called for under new Rule 19"); Benjamin Kaplan, *Continuing Work of the Civil*

Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 405 (1967) ("[T]he interest spoken of in new rule [24] finds its own limits in the historic continuity of the subject of intervention and in the concepts on new rule 19, to which intervention looks for analogy."). It strains credulity to think Rule 19(a)(1)(B)(i) would ever be used to require the joinder in a QTA case of a person who did not assert an ownership interest in the real property. It follows then, that such a person is not entitled to intervene as of right in a QTA case.

Applying the foregoing principles and precedents to the instant case compels the conclusion that the Ninth Circuit erred when it ruled that the environmental groups had the requisite "interest" to intervene as of right. Petitioner's Appendix ("Pet. App.") 8. It was undisputed that the environmental groups lack a property interest in the R.S. 2477 or the land burdened thereby. Pet. App. 7 ("Everyone agrees that . . . the [environmental groups] . . . have no property interest."). Instead, the environmental groups asserted merely an "interest in seeing that the wilderness areas be preserved for use and enjoyment of their members." Pet. App. at 8. In other words, the environmental groups asserted a general interest in the management of the federal lands surrounding the R.S. 2477. That this interest is not sufficient to intervene in a QTA case is clear. Indeed, just as the taxpayer in *Donaldson* could not intervene despite his non-trivial interest in preventing the disclosure of his former employer's records, environmental groups,

which assert no ownership interest in the disputed real property, are not entitled to intervene in QTA cases because they lack the necessary interest.

II. THIS COURT SHOULD GRANT REVIEW TO PREVENT ENVIRONMENTAL GROUPS FROM TURNING FEDERAL COURTS INTO PUBLIC FORUMS FOR DEBATING FEDERAL LAND MANAGEMENT POLICIES.

In ruling in favor of environmental groups, the Ninth Circuit erroneously relied on the Tenth Circuit's heavily fragmented decision in *San Juan County, Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc). Pet. App. 8. In that case, seven of the thirteen judges sitting en banc ruled that environmental groups had a sufficient interest to intervene in a QTA case involving an R.S. 2477 because of their purported interest in the use of the area for "conservation, aesthetic, scientific and recreational purposes."[6] *San Juan County*, 503 F.3d at

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[6] Three judges from the majority opinion ruled that the environmental groups' interest was adequately represented by the United States. *San Juan County*, 503 F.3d at 1203-07. The six concurring judges would have ruled that the environmental groups lacked a legally protectable interest relating to property at issue because the environmental groups' concern about the "use" of the surrounding land had no relationship to the issue in the case, *i.e.*, "ownership" of the right-of-way. *Id.* at 1208 (concurring opinion). Based upon these nine votes, the en banc court affirmed the district court's denial of intervention. *Id.* at 1207.

1199-1203. In so doing, the majority opinion essentially limited this Court's ruling in *Donaldson* to the facts in that case. *Id.* at 1191-92. This allowed the majority opinion to conclude that the environmental groups' "concern" about the area surrounding the right-of-way was a sufficient interest for intervention of right. *Id.* at 1199. If the taxpayer's "desire" in *Donaldson* to prevent the disclosure of his employment records, which could result in civil or criminal penalties, was not a "significantly protectable interest," *a fortiori*, an abstract "concern" about the environment is not "significantly protectable interests" in a QTA case.

To make matters worse, the majority opinion read out of Rule 24(a)(2) the requirement that the asserted "interest" "relat[e] to the property . . . that is the subject of the action[.]" Fed. R. Civ. P. 24(a)(2). Instead, the majority opinion adopted a purportedly "pragmatic" test that merely looks to the "practical effect" the litigation may have on an applicant's interest.[7] *San Juan County*, 503 F.3d at 1199-2000. This "test," however, violates this Court's admonition that courts are to "apply the text [of a Rule.]" *Pavelic & LeFlore*, 493 U.S. at 126; *cf. United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not

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[7] The concurring opinion criticized the majority's "pragmatic" test because the "practical effect" of having unnecessary parties in QTA cases was increased litigation costs for the real parties in interest. *San Juan County*, 503 F.3d at 1209.

destroy. [Thus, it] is our duty to give effect, if possible, to every clause and word of a statute. . . .") (internal quotations and citations omitted).

More seriously, the majority opinion's purportedly "pragmatic" test, which was implicitly adopted by the Ninth Circuit in the instant case, knows no bounds because the situations in which a case may have some "practical effect" on an abstract environmental "concern" are almost limitless. Thus, environmental groups now have an open invitation to move to intervene and voice their abstract "concerns" in QTA cases across the country. To say that such an open invitation defeats the purpose of the Federal Rules of Civil Procedure, which is to secure the "just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, is an understatement. Indeed, as explained by the concurring opinion in *San Juan County*:

> An intervenor in a quiet title action seeking to maintain the land's current use has every incentive to use its participation to postpone a final decision on the merits, thereby prolonging its use at the expense of the parties' need to have a final adjudication of the title.

503 F.3d at 1210 (concurring opinion).[8]

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[8] The concurring opinion could have been referring to the situation in the instant case. Petitioner and the United States resolved their differences regarding the disputed right-of-way in 2001. Pet. App. 4. Seven years later, they are being held hostage

(Continued on following page)

In short, the Ninth Circuit's decision in the instant case has turned federal courts into public forums for debating federal land management policy. Federal courts, however, are not the place to debate policy. *Cf.*, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (Standing ensures that "legal questions . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."); *United States v. Richardson*, 418 U.S. 166, 174 (1974) (A taxpayer may not use "'a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'") (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)); *Warth,* 422 U.S. at 499-500 (noting that under the separation of powers doctrine "generalized grievances" need to be aired before the other branches of government). Indeed, as the Court of Federal Claims explained twelve years ago in denying intervention to environmental groups in an inverse condemnation action:

> The courts have never been a proper place to debate public policy, though this may appeal

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in a QTA case by environmental groups that have no ownership interest in the real property. Because the Ninth Circuit vacated the approved settlement agreement, Pet. App. 9, and remanded with instructions for the district court to consider the purported objections of the environmental groups, Pet. App. 13-14, Petitioner and the United States may be held hostage for another seven years.

> to the judicial ego. Once judges start setting public policy they cease to be the least dangerous branch.

Hage v. United States, 35 Fed. Cl. 737, 741 (Fed. Cl. 1996).

Taken to its extreme, however, the rationale of the Ninth Circuit's decision may now be used by environmental groups to intervene in inverse condemnation cases, as well as eminent domain proceedings. Therefore this Court should grant review to prevent environmental groups from turning federal courts into public forums for debating federal land management policies.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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